OCT 4 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

NO. 483

WEIRTON STEEL COMPANY, Petitioner,

v.

COSTANZO COAL MINING COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

C. M. THORP, JR.,
JOHN E. LAUGHLIN, JR.,
THORP, BOSTWICK, REED & ARMSTRONG,
2812 Grant Building,
Pittsburgh, Pa.
CARL G. BACHMANN,
1513 Chapline Street,
Wheeling, W. Va.,
Attorneys for Petitioner.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BOULEVARD OF ALLIES, PITTSBURGH, PA.

INDEX.

	PAGE
Summary Statement of the Matter Involved	2
(a) The Proceedings Below	2
(b) The Facts of the Case	2
Jurisdiction	7
Questions Presented	8
Reasons Relied on for the Allowance of the Writ	9
Brief in Support of Petition for Writ of Certiorari	11
Opinions Below	11
Jurisdiction	11
Statute Involved	12
Statement	12
Specification of Errors to be Urged	12
Summary of Argument	13
Argument	13
I. The Decision of the Circuit Court Is in Conflict With Applicable Decisions of This Court	13
II. The Circuit Court's Decision Has Decided an Important Question of Federal Law Which Has Not Been But Should Be Decided by This Court	23

CASES CITED.

PAGE

Brown v. Tarkington, 70 U. S. 377, 18 L. Ed. 255 (1866) 17

Daniels v. Tearney, 102 U. S. 415, 26 L. Ed. 187 (1880) 19

Detroit Edison Co. v. Wyatt Coal Co., 293 F. 489 (C.C.A. 4th, 1923) 18

A. C. Frost & Co. v. Coeur D'Alene Mines Corporation, 312 U. S. 38, 61 S. Ct. 414 (1940) 19

Louisville & Nashville Railroad Company v. Maxwell, 237 U. S. 94, 35 S. Ct. 494 (1915) 22

Oregon Short Line R. Co. v. American Smelting & Refining Co., 269 Fed. 898 (C.C.A. 8th, 1920) ... 18

Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261, 26 L. Ed. 539 (1881) 18

Roberts v. Criss, 266 F. 296 (C.C.A. 2d, 1920) 18

Sunshine Anthracite Coal Company v. Adkins, 310 U. S. 381, 60 S. Ct. 907 (1940) 2, 14

Weil v. Neary, 278 U. S. 160, 49 S. Ct. 144 (1929) ... 18

Whitfield v. United States, 92 U. S. 165, 23 L. Ed. 705 (1876) 17

AUTHORITIES CITED.

PAGE

Williston on Contracts (Revised Edition), Volume 5, Sec. 1630 18

STATUTES CITED.

Act of June 29, 1906 (49 U.S.C., Sec. 41) 21

Bituminous Coal Act of 1937 (50 Stat. 72; 15 U.S.C.A. Sec. 828 et seq.) 2, 12, 14, 15, 23

Bituminous Coal Code 2, 5

Interstate Commerce Act, Section 10 (49 U.S.C., Sec. 10) 21

Judicial Code, Section 240(a), as amended, 28 U.S.C. 347(a) 7, 11

Lever Act 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

NO. .....

WEIRTON STEEL COMPANY, Petitioner,

v.

COSTANZO COAL MINING COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered on July 26, 1945, reversing and remanding a judgment of the District Court of the United States for the Northern District of West Virginia entered on January 3, 1945.

Summary Statement of the Matter Involved.

(a) THE PROCEEDINGS BELOW.

The Opinion of the District Court of the United States for the Northern District of West Virginia was entered on January 3, 1945 and is reported in 58 F. Supp. 493. The Opinion of the Circuit Court of Appeals was entered on July 26, 1945 and is not yet officially reported.

(b) THE FACTS OF THE CASE.*

This case arises under the Bituminous Coal Act of 1937 (50 Stat. 72; 15 U.S.C.A., Sec. 828 *et seq.*), the constitutional validity of which was sustained by this Court in *Sunshine Anthracite Coal Company v. Adkins,* 310 U. S. 381, 60 S. Ct. 907 (1940). Such Act created the Bituminous Coal Code, which was in substance a statutory agreement among participating coal producers to adhere to certain standards of fair competition, including minimum prices to be fixed by the administrator of the Code.

The respondent (the plaintiff below), which was a sales agent for producers of bituminous coal and a registered distributor under the Code, brought an action against the petitioner in the District Court of the United States for the Northern District of West Virginia, to recover the difference between the contract price paid by the petitioner for coal purchased from the respondent's principals and the minimum price established by the Bituminous Coal Division of the Department of the In-

---

* Record references relate to the record before the Circuit Court of Appeals, consisting of several appendices to the brief of the appellant (the respondent in this Court). Page references are to the pages of the Record in this Court.

terior under the authority of the Code. The claim was based on deliveries of coal occurring between October 1, 1940, the effective date of the minimum prices, and March 23, 1941, the date on which the petitioner terminated its contract with the respondent, and the amount involved was $176,116.24 (See Opinion of the Circuit Court of Appeals, R. 58 *et seq*). The case was heard by the District Court, without the intervention of a jury, upon the pleadings and an Agreed Statement of the Facts. The District Court, on January 3, 1945, made and entered certain Findings of Fact and Conclusions of Law (Appendix B to appellant's brief, R. 13 *et seq.*) together with its Opinion directing that judgment be entered for the defendant, i.e., the petitioner. The respondent appealed to the United States Circuit Court of Appeals for the Fourth Circuit which, on July 26, 1945, entered its Opinion directing that the judgment below be reversed and the case remanded.

The essential facts of the controversy, as set forth in the Agreed Statement of Facts (Appendix F to appellant's brief, R. 21 *et seq.*) and the Findings of the District Court, are as follows:

The respondent was a general sales agent for two producers of bituminous coal, the Cove Hill Coal Company and Wheeling Valley Coal Corporation. It operated under written agency agreements with both producers which were almost identical and which provided, in substance, that the respondent would act as exclusive sales agent for the coal companies, could make contracts binding upon them, would receive commissions on all sales negotiated for them and would guarantee the collectibility of all accounts (Agreed Statement, Appendix F to appellant's brief, R. 33 to 36).

Pursuant to these agency agreements, the respondent, on March 20, 1933, entered into a written agreement with the petitioner, a manufacturer of iron and steel products, to supply 90% of the petitioner's requirements of steam coal for a period of one year from April 1, 1933. This contract (Agreed Statement, Appendix F to appellant's brief, R. 24) contained a renewal clause reading as follows:

> "That deliveries of said coal is to be confined between dates of April 1, 1933 and April 1, 1934 with renewal privilege for period of two years, each upon written notice by purchaser 30 days prior to April 1, 1934."

Both the petitioner and the respondent interpreted this somewhat ambiguous renewal clause as permitting *a series* of renewals for two-year periods and, on the basis of such understanding, the petitioner exercised its renewal privilege in 1934, 1936, 1938 and 1940, with the result that, whether or not the parties correctly interpreted the contract, they were *in fact* acting under it during the period involved in the suit. As a matter of fact, the Agreed Statement of Facts contains the express stipulation (Appendix F to appellant's brief, R. 32) that the petitioner and the respondent *"did not make or have any contract or agreement with respect to the deliveries of coal"* involved in the action below *"except the instrument and (renewal) letters"* attached to the Agreed Statement of Facts.

The Bituminous Coal Act did not impose the Bituminous Coal Code upon all producers of bituminous coal but created a procedure for voluntary participation and provided an incentive to membership in the form of relief from a penalty tax of 19½% on coal sales and a limited exemption from the Anti-Trust Laws.

The Bituminous Coal Code contained many detailed provisions which need not be delineated. The relevant portions can be briefly summarized as follows:

1. It authorized the Bituminous Coal Division of the Department of the Interior, as the Code Administrator, (a) to establish minimum prices to be observed by members of the Code, (b) to fix maximum prices for such members if necessary to protect consumers, and (c) to promulgate marketing rules for Code members and their agents and distributors; and

2. It established certain general standards of fair competition to be observed by producers who entered the Code.

The Act also provided, however, that coal contracts made before June 16, 1933, would be exempt from price control.

The two producers whom the respondent represented accepted membership in the Code and the respondent itself registered as a distributor of coal under the marketing rules promulgated by the Code Administrator. Eventually, the Bituminous Coal Division, on August 8, 1940, established minimum prices for bituminous coal sold or offered for sale by *"persons subject to the Code"*, which prices became effective October 1, 1940. During the period October 1, 1940 to March 21, 1941 the respondent, as sales agent for its two producer-principals, caused to be sold and delivered to the petitioner more than 150,000 tons of coal at the prices agreed upon between the parties under the original contract and renewal agreements described above (Agreed Statement, R. 24). The coal so delivered was invoiced to the petitioner at such prices and the invoices were paid by the

petitioner to the respondent which remitted the amounts, after deducting its commissions, to its principals (See paragraph 6, Findings of Fact, R. 14).

It is conceded that the prices actually paid under the original contract as renewed were lower than the minimum prices promulgated by the Code Administrator, the difference, over the entire period, amounting to the sum in suit. The respondent, however, assured the petitioner that it was entitled to deliver the coal at prices below the Code minima because the original contract was exempt from the application of the Code, as an agreement in existence before June 16, 1933 (See Agreed Statement, R. 52-53).

In March, 1941, the Administrator of the Code charged the respondent with alleged violations of Marketing Rules applicable to registered distributors and ordered it to cease deliveries to the petitioner at prices below the Code prices. As a result, on March 21, 1941, the respondent orally advised the petitioner that deliveries after that dated would be made at Code prices to which the petitioner replied that deliveries should be made at the contract prices or not at all (Findings of Fact, R. 14). This notification and reply were then confirmed by an exchange of letters and deliveries ceased on March 23, 1941 (Agreed Statement, R. 47-48).

Within a few months, the Bituminous Coal Division instituted proceedings against the respondent to revoke its registration as a distributor because of these and other transactions. The petitioner was not a party to the proceedings; therefore the ultimate ruling of the Code Administrator appears to be immaterial. However, it should be said for the information of the Court that

the respondent was found guilty of transgressions of the Code.

The respondent then instituted the action in the Court below to recover the difference between the contract prices and the Code prices. The District Court directed the entry of a judgment for the petitioner, on three grounds:

1. The petitioner, as a purchaser of coal, was not subject to the Act or the Code, and the respondent, if it had violated the Code, could not take advantage of its own wrong and recover from the innocent purchaser in derogation of a contract which the latter believed to be lawful.

2. The cause of action, if it existed, was the property of the sellers of the coal and could not be enforced by their sales agent.

3. The District Court had no jurisdiction of the action since it was in effect a suit on an implied contract between citizens of the same State.

This Petition presents the first question decided by the District Court and it is the petitioner's contention that the decision of the District Court on this point was in conformity with several applicable decisions of this Honorable Court and with the plain intent of the Bituminous Coal Act.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U.S.C. 347(a).

Questions Presented.

1. Whether or not a plaintiff who has violated a statute of the United States may repudiate a fully executed contract against an innocent party who was not subject to the statute and recover a sum in excess of the contract price on the ground that the plaintiff violated the statute in performing the contract?

2. Whether or not the Bituminous Coal Act of 1937 or the Bituminous Coal Code, established pursuant to such Act, creates a cause of action on the part of a distributor of bituminous coal, who was registered under the Code, to recover from the purchaser of such coal the difference between the agreed prices at which such coal was delivered and paid for and the minimum prices fixed by the Code, where the purchaser, who was not a party to the Code or subject to its terms, believed and was informed by the distributor that the agreed prices were lawful prices?

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court has decided a Federal question in a way which is in conflict with applicable decisions of this Court, which hold that the Courts of the United States will not permit a wrongdoer to recover from an innocent party to an executed contract on the ground that the performance of such contract by the wrongdoer was contrary to a statutory obligation of the wrongdoer.

2. The decision of the Circuit Court has decided an important question of Federal law which has not been

but should be decided by this Court, in that it has ruled that the Bituminous Coal Act of 1937 and the Bituminous Coal Code create an implied contract on the part of a person not subject to the Act or Code to pay Code prices, regardless of an agreement, made in good faith, providing for other prices.

Respectfully submitted,

WEIRTON STEEL COMPANY, *Petitioner,*

By—C. M. THORP, JR.,
By—CARL G. BACHMANN,
Attorneys for Petitioner.

C. M. THORP, JR.,
JOHN E. LAUGHLIN, JR.,
THORP, BOSTWICK, REED & ARMSTRONG,
2812 Grant Building,
Pittsburgh, Pa.
CARL G. BACHMANN,
1513 Chapline Street,
Wheeling, W. Va.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

NO. .....

WEIRTON STEEL COMPANY, Petitioner,

v.

COSTANZO COAL MINING COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The Opinion of the District Court was entered on January 3, 1945 and is reported in 58 F. Supp. 493.

The Opinion of the Circuit Court of Appeals was entered on July 26, 1945 and is included in the record but is not yet officially reported.

Jurisdiction.

The judgment sought to be reviewed is a final judgment of the Circuit Court of Appeals for the Fourth Circuit, reversing and remanding a judgment of the District Court of the United States for the Northern District of West Virginia. The jurisdiction of this Honorable Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U.S.C. 347(a).

Statute Involved.

The statute involved is the Bituminous Coal Act of 1937, 50 Stat. 72, 15 U.S.C. §828 *et seq.* The Act expired by its terms on August 24, 1943, after two extensions.

Statement.

The essential facts are summarized in the Petition for Certiorari under the caption "Summary Statement of the Matters Involved" (*supra* pages 2 to 7).

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the Bituminous Coal Act of 1937 creates an implied contract on the part of a purchaser of coal to pay the minimum prices for coal purchased from members of the Code, despite the fact that the coal was purchased and paid for pursuant to an express contract calling for lower prices, which the purchaser, relying on assurances of the seller's agent, assumed to be valid; and

2. In holding that a wrongdoer may repudiate transactions with an innocent party to a fully executed contract on the ground that such contract was unlawful under a statute applicable only to the wrongdoer, and recover from the innocent party on an implied contract predicated upon such statute.

Summary of Argument.

The substantive and remedial measures of the Bituminous Coal Act and the Bituminous Coal Code in terms apply *only* to persons joining the Code. An analysis of the Act and its legislative history demonstrates that no obligation was placed upon the buyer of coal to investigate or observe minimum prices established under the Code. The Circuit Court nevertheless held that a person who was subject to the Code can set aside a fully executed contract with an innocent party on the ground that it violated the Code and impose upon such innocent party prices higher than it had agreed to pay. (a) This ruling is contrary to well established decisions of this Court and of various Circuit Courts that the guilty party to a fully executed contract may not recover against an innocent party on the ground that the transactions between them violated a statutory or other obligation of the guilty party. (b) The ruling also substantially extends the Act beyond its expressed scope and therefore presents an important question which should be decided by this Court.

Argument.

I.

THE DECISION OF THE CIRCUIT COURT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Although an argument on the merits is inappropriate at this stage of the proceedings, some reference to the underlying points of law is essential to a clear exposition of the case.

The Bituminous Coal Act of 1937 was not a self executing statute, nor did it apply to all producers of bitu-

minous coal. It did not *require* that coal be sold at certain prices or that the sellers of coal observe certain competitive practices, but merely provided a procedure by which coal operators could join in an agreement to establish fair trade rules and minimum price standards. It is true that the individual's freedom to remain aloof from the Code was restricted by a penalty tax of 19½% on non-conformists, but the statutory option nevertheless existed and was considered by this Court as an important factor in sustaining the constitutional integrity of the legislation:

> *Sunshine Anthracite Coal Company v. Adkins,* 310 U. S. 381, 60 S. Ct. 907 (1940).

It is equally clear that neither the Act nor the Code purports to impose any duty or obligation on the buyer of coal or to create any remedy against him. Thus Section 4 of the Act, which contains the Code, states explicitly that:

> "Producers accepting membership in the code as provided in section 5(a) shall be and are herein referred to as, code members, and *the provisions of such code shall apply only to such code members,* except as provided by sub-section (b) of Part II of this section." (Emphasis supplied)

(The proviso referred to in the exception extends the Code to one other group, i.e., registered distributors.)

Other provisions of the Act and Code confirm the intent of the opening limitation set forth above. Thus sales below the minimum prices or above the maximum prices established by the Division are not characterized as violations of the Act but as violations *"of the code"*

[Section 4, II (e)] and the unfair trade practices which the Code proscribes are also called "violations *of the code*" [Section 4, II (i)]. A similar restriction of the application of the Act and Code can be found in the choice of remedies, both of which are directed against *members only*. The principal enforcement device was of course the power of the Division, in proceeding before it (reviewable by the Courts of the United States—see Section 6) to revoke a producer's membership and therefore his tax exemption and to make it a condition of reinstatement that the defaulter pay to the United States "double the amount of the tax * * * upon the sales price * * * of the coal sold or disposed of *by the code member in violation of the code or regulations thereunder.*" [Section 5(b) and (c)] The second, and *only other,* remedy was a suit for treble damages by an injured Code member against another *member* under Section 5(d).

The intent of Congress to confine the application of the substantive and remedial measures of the Act and Code to members is confirmed by the legislative history of the Act. Thus after the Bill had passed the House of Representatives, the Senate inserted several amendments, one of which provided that:

> "Any person, firm or corporation or other entity who shall knowingly purchase coal from any code member in such a manner that the sale of such coal constitutes a violation of the code on the part of such code member shall be deemed guilty of a misdemeanor and upon conviction thereof shall suffer a fine not exceeding $1 for each ton of coal so purchased" (see Section 10(d) of the Senate Bill).

Another Senate amendment sought to accomplish *the very result which the Circuit Court's decision attributes to the statute as enacted,* by proposing that:

> "Any *contract* made on or subsequent to said date (i.e. June 16, 1933) which provides for a price below such established minimum price level *shall be unenforceable as to such price provision."* (See Senate Bill, Section 4, II (e)—emphasis supplied)

Both amendments were eliminated by the Conference Committee of the House and Senate, which surely supplies wellnigh conclusive evidence that Congress never intended to penalize the buyer for the seller's delinquencies or to make all contracts, other than pre-Code agreements, invalid.

As a consequence, the case before the Court presents these essential features: (1) The respondent, by registering as a distributor under the Marketing Rules of the Code, in effect agreed that it would sell at the specified minimum prices; (2) the transactions between the petitioner and the respondent arose under a formal contract which the respondent represented to be exempt from Code regulation; (3) the respondent was engaged in the coal business and was presumably familiar with the scope of the regulatory features of the Code, whereas the petitioner was not; (4) the contract between the parties was fully executed, in the sense that the petitioner paid the prices specified by the respondent and the respondent accepted such payments as in full liquidation of the accounts between them; and (5) as soon as the petitioner was advised of the respondent's violation of the Code, the contract was terminated.

On these facts, the Circuit Court held that the contract between the parties was illegal and unenforceable, that there should be imposed in lieu thereof an implied contract (implied "in law" because no such factual implication was possible) to pay Code prices and that the plaintiff's misconduct was no bar to recovery. This ruling, it is submitted, is clearly contrary to many rulings of this Court and conflicts with well established principles of Federal Law.

This Court has held, since the days of Chief Justice Marshall, that the Federal Courts will not lend the assistance of their process to either party to an unlawful bargain. For example, in *Brown v. Tarkington,* 70 U. S. 377, 18 L. Ed. 255 (1866), this Court refused to permit recovery upon certain promissory notes of a bank which had been organized and had transacted its business under a territorial statute but without complying with the Federal Organic Law. In overruling the plaintiff's contention that the illegal organization of the bank had no bearing on the validity of the notes, this Court stated, at 70 U. S. 380:

> "The only material question open was, whether or not the plaintiff was *particeps criminis.* If he was, he was disabled, under the maxim, to recover. The law leaves the party thus situated where it finds him."

Again, in *Whitfield v. United States,* 92 U. S. 165, 23 L. Ed. 705 (1876), this Court announced the general principle as follows:

> "As a general rule, the law leaves the parties to illegal contracts where it finds them, and affords relief to neither" (92 U. S. 169).

Other decisions to the same effect are *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 26 L. Ed. 539 (1881); *Weil v. Neary*, 278 U. S. 160, 49 S. Ct. 144 (1929).

The same doctrine seems to be a matter of general law (See *Williston on Contracts* (Revised Edition), Volume 5, Section 1630) and has been followed in several decisions of the various Circuit Courts.

> See for example, *Roberts v. Criss*, 266 F. 296 (C.C.A. 2d, 1920); *Oregon Short Line R. Co. v. American Smelting & Refining Co.*, 269 Fed. 898 (C.C.A. 8th, 1920).

In this connection, it is difficult to reconcile the decision of the Circuit Court with its own prior decision in *Detroit Edison Co. v. Wyatt Coal Co.*, 293 F. 489 (C.C.A. 4th, 1923). In that case, the plaintiff had purchased quantities of coal from the defendant at prices in excess of the prices fixed by the so-called Lever Act. The Lever Act, it will be recalled, authorized the establishment of maximum prices during the First World War and, although it did not contain any provisions permitting the recovery of the overcharges, made it a criminal offense to demand or receive prices higher than the maxima. In holding that the plaintiff, as a participant in the unlawful transaction, could not recover, the Circuit Court stated:

> "What the plaintiff did becomes of especial interest as bearing upon its legal right to maintain this action to recover back money paid by it by reason of its acquiescence in and cooperation with the defendant, in the assertion of the excessive price for

the coal in violation of the Lever Act, and as to which, from our viewpoint, the parties are in pari delicto. It is true the plaintiff paid out money which it need not have done; but that does not avail it, since in this class of cases the law will not lend itself to afford one of two wrongdoers relief against the other. On the contrary, it will leave them in the position in which they are found."

This Court has frequently recognized an exception to the general rule in cases where one of the parties is innocent and has rendered full performance of his side of the bargain, in good faith. This, for example, was the situation in cases such as *Daniels v. Tearney,* 102 U. S. 415, 26 L. Ed. 187 (1880), which involved a suit on a bond to stay execution which had been given by the defendant pursuant to the Secession Acts of the State of Virginia. In denying the defendant's plea that the bond was invalid, this Court pointed out (at 102 U. S. 420) that:

> "If parties are *in pari delicto,* the law will help neither, but leaves them as it finds them. But if two persons are in *delicto,* but one less so than the other, the former may, in many cases, maintain an action for his benefit against the latter."

A somewhat similar ruling appears in the recent decision of this Court in *A. C. Frost & Co. v. Coeur D'Alene Mines Corporation,* 312 U. S. 38, 61 S. Ct. 414 (1940). In that case, the plaintiff had an option to purchase up to 1,300,000 shares of treasury stock of the defendant corporation at 10¢ per share with the right to receive the proceeds of shares sold by the defendant on its own account in excess of 10¢ per share. The plaintiff ob-

tained 165,000 shares for which it paid the option price. The defendant, however, refused to deliver the remaining optioned shares and also refused to pay the plaintiff the credits it was entitled to on sales made by the corporation itself. In a suit to recover the amount of the credits and damages for the breach of the agreement, the defendant pleaded that the contract was unlawful because the stock had not been registered under the Securities Act of 1933. This Court, in reversing a judgment for the defendant, pointed out that the Securities Act contained several specific remedies but neither expressly invalidated the contract in suit nor created any remedy against its enforcement. The Court therefore upheld the contract, saying:

> "Courts have often added a sanction to those prescribed for an offense created by statute where the circumstances fairly indicated this would further the essential purpose of the enactment; but we think where the contrary definitely appears—actual hindrance indeed of that purpose—no such addition is permissible. The latter situation is beyond the reason which supports the doctrine now relied upon.
>
> * * * * * * *
>
> "* * * If it definitely appears that enforcement of a contract will not be followed by injurious results, generally, at least, what the parties have agreed to ought not to be struck down."

There is a definite parallel between the situation involved in the case just cited and the instant case. The Bituminous Coal Act, like the Securities Act of 1933, contains no provision invalidating the contract between the petitioner and the respondent; on the contrary, as

we have pointed out, an amendment which would have had that effect was stricken from the Bill in conference. In like manner, the Bituminous Coal Act does contain two specific remedial devices, both of them directed against the wrongdoer, viz., the person who has violated his statutory agreement under the Code. No remedy is awarded to the wrongdoer as against the buyer and the only provision which ever suggested such relief was eliminated from the final draft of the statute.

So far as the essential purpose of the statute is concerned, it certainly does not aid that purpose to award a premium to the one who violated the Act at the expense of an innocent party. Moreover, the innocent party in this case, if it had not relied upon the contract, could have procured its coal from other sources at other prices.

The Opinion of the Circuit Court sought to avoid these difficulties by comparing the Bituminous Coal Act with provisions of the Interstate Commerce Act prohibiting tariff discounts and rebates. The parallel, however, between the two statutes is faulty. The Interstate Commerce Act is a statute of general application applying to *all* carriers, to *all* shippers and to *all* travelers. Section 10 of the Act (49 U.S.C., Sec. 10) makes it a penal offense for any person to induce a carrier to discriminate or to obtain a concession or rebate by false billing or other improper means. In like manner, the Act of June 29, 1906 (49 U.S.C., Sec. 41) supplementing the Interstate Commerce Act forbids the shipper or traveler to accept or receive rebates, concessions or discriminations. On the basis of the clear intent of the Act to impose an obligation on the shipper and traveler, as well as on the

carrier, this Court has upheld the right of the carrier to recover unlawful discounts and rebates, regardless of its own participation in the wrong. Otherwise, this Court has pointed out, other shippers and travelers who had suffered from the discrimination would have been deprived of the protection which the statute sought to give them. Thus, in *Louisville & Nashville Railroad Company v. Maxwell,* 237 U. S. 94, 35 S. Ct. 494 (1915), the Court declared:

> "Under the interstate commerce act, *the rate of the carrier duly filed is the only lawful charge.* Deviation from it is not permitted upon any pretext. *Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it,* unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination." (Emphasis supplied)

The situation in the instant case is vastly different. The Bituminous Coal Act was not designed to aid other buyers of coal but to enable the producers of coal to enter into voluntary codes of fair competition. The statutory obligation is placed *solely* upon the *seller* of coal and any possible implication that the buyer should be bound to observe the Act or Code was eliminated from the legislation before final enactment. Moreover, although there is but *one rate* for *all* shippers and con-

signees under the Interstate Commerce Act, that was not true of the Coal Act and no person dealing with a seller of coal could be justly charged with notice that the coal could be sold at but one price. The petitioner, if it had been advised that the prices it was paying were unlawful, could have purchased its coal from non-members of the Code or from producers of non-bituminous fuel or it could have mined its own coal.

II.

THE CIRCUIT COURT'S DECISION HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

The Bituminous Coal Act and the Code which it created were carefully engineered, as we have pointed out, to confine both their substantive measures and their enforcement devices to a select group, i.e., those sellers of coal who would be willing to trade the advantages of tax and anti-trust exemptions for the restrictive features of the Code. If Congress had wished to compel the buyer of coal to assist in policing the prices and practices of Code members by forcing the buyer to deal at his peril, it would have at least permitted some implication of such a duty to remain in the Act and would not have eliminated the only sections relating to sanctions against the buyer.

The Act, it is true, is no longer in effect. Nevertheless, in the course of its existence, there were undoubtedly hundreds of thousands of transactions coming under or near its ken. Since the decision of the Court below extends the substantive operation of the Act and

its remedial phases far beyond the Act's apparent scope to a class of persons who were not subject to it, the question involved appears to be of the utmost importance and one which should be determined by this Honorable Court.

Respectfully submitted,

WEIRTON STEEL COMPANY, *Petitioner,*
By—C. M. THORP, JR.,
By—CARL G. BACHMANN,
Attorneys for Petitioner.

C. M. THORP, JR.,
JOHN E. LAUGHLIN, JR.,
THORP, BOSTWICK, REED & ARMSTRONG,
2812 Grant Building,
Pittsburgh, Pa.
CARL G. BACHMANN,
1513 Chapline Street,
Wheeling, W. Va.

FILED
OCT 19 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 483

WEIRTON STEEL COMPANY,
Petitioner,

vs.

COSTANZO COAL MINING COMPANY,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE A. BLACKFORD,
Board of Trade Building,
Wheeling, West Virginia;
GORDON D. KINDER,
Brady Building,
Martins Ferry, Ohio,
Counsel for Respondent.

INDEX

Subject Index

Page

Brief of respondent in opposition to petition for writ of certiorari 1
Facts present questions different from those asserted by petitioner 1
Right of seller to recover difference between minimum price and what he received for coal exists as certainly as right of carrier to recover difference between contract rates and Interstate Commerce Commission tariffs 3
In pari delicto rules does not apply in this case because public interest is involved 7
The law wrote the minimum price into the contract. 9

Table of Cases Cited

A. T. & S. F. Ry. Co. v. *Judson*, 49 Fed. Supp. 789 ... 6
Colorado Interstate Gas Co. v. *Federal Power Commission*, 142 Fed. (2d) 943 10
Fort Worth & D. C. Ry. Co. v. *Burkhart Mfg. Co.*, 56 Fed. Supp. 159 6
Interstate Commerce Commission v. *B. & O. R. R. Co.*, 145 U. S. 265, 36 L. Ed. 699 4
Kurn, et al. v. *Pittsburgh Plate Glass Co.*, 48 Fed. Supp. 574 6
Louisville & Nashville Railroad Co. v. *Central Iron & Coal Co.*, 265 U. S. 59, 68 L. Ed. 900 6
Louisville & Nashville Railroad Co. v. *McMullen*, 59 So. 683 8
Louisville & Nashville Railroad Co. v. *Williamson*, 87 Fed. (2d) 34 6
Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. *Fink*, 250 U. S. 577, 67 L. Ed. 1151 4
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 84 L. Ed. 1263 3

Statutes Cited

Bituminous Coal Act of 1937 3
A. L. R., Vol. 83, p. 258 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 483

WEIRTON STEEL COMPANY,
Petitioner,

vs.

COSTANZO COAL MINING COMPANY,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Facts Present Questions Different from Those Asserted by Petitioner

This case was submitted in the District Court on an agreed statement of facts and no other evidence. The controlling facts are stated and analyzed in the opinion of the Circuit Court of Appeals (R., pp. 58-71).

There is no justification in the record for the statements made in the Petitioner's petition, (page 6) and in Petitioner's brief, (pages 12, 16 and 21) depicting the Petitioner as an imposed on innocent, coaxed into a contract by Respondent's willful misrepresentations of the law. The record shows (R., pp. 27-31) that both the Petitioner and the Respondent thought the contract between them was a

renewal of the written contract dated March 20, 1933; that no assurances that the contract did not come under the Bituminous Coal Act of 1937 were given to the Petitioner by the Respondent prior to the date of the contract involved which was effected by the exchange of letters written February 27, 1940, and February 29, 1940 (R., p. 37) and that the Petitioner and the Respondent first discussed the applicability of the Bituminous Coal Act to their contractual relationship by letters written during March, 1941 (R., pp. 52-56), when the contract was more than a year old, after all but about 13,000 of the 150,430.8 tons of coal involved had been delivered and very shortly after the attorney for the Bituminous Coal Division had expressed doubt as to the contract between the Petitioner and the Respondent being a pre-code contract.

The nearest these letters get to an assurance is the statement in the letter written March 11, 1941 to the effect that Respondent's lawyer *can* see no reason why the Bituminous Coal Division *should not* exempt the contract (R., p. 55) and the statement in the March 6th letter that pre-code contracts are exempt (R., p. 52).

The record does not show that the agreement dated March 20, 1933, was entered into pursuant to the agency agreements set out on pages 33-36 of the Transcript of Record, as is claimed in the Petitioner's petition (page 4), but on the contrary affirmatively shows that this could not have been the fact, for the reason that the agreement with Cove Hill Coal Company (R., p. 33) was executed January 2, 1940, and the Wheeling Valley Coal Corporation agreement (R., p. 35) was executed June 1, 1933, both thus post-dating the March 20, 1933, agreement.

The question presented therefore is not whether the respondent may repudiate a fully executed contract against an innocent party who relied on representations falsely

made, but, rather, whether a manufacturing concern, located in the heart of the bituminous coal district and having every opportunity to know what the law is, can obtain great quantities of coal for about half the price fixed by the government, avoid payment by evoking the in pari delicto rule and by so doing nullify a law that was enacted for the sole purpose of maintaining uniform prices and thereby stabilizing the bituminous coal industry.

The Circuit Court of Appeals announced no new law when it held that the in pari delicto rule does not apply in this case.

Right of Seller to Recover Difference Between Minimum Price and What He Received for Coal Exists as Certainly as Right of Carrier to Recover Difference Between Contract Rates and Interstate Commerce Commission Tariffs.

The right of a seller of coal to recover from the buyer the difference between the minimum prices fixed under the code and the amounts paid by the buyer exists as certainly as the right of a carrier to recover the difference between the prices stipulated in a shipping contract and the tariff fixed by the Interstate Commerce Commission, or as the right of a stockyards company to recover from a user of its stockyards charges fixed by the Secretary of Agriculture under the Packers and Stockyards Act.

None of these acts specifically imposes on the carrier, or the packing company or the seller of coal the duty of bringing suit. The tariffs and price schedules under all are fixed by administrative bodies.

The Bituminous Coal Act was enacted for the purpose of stabilizing the coal industry, primarily through price fixing and the elimination of unfair competition.

Sunshine Anthracite Coal Company v. *Adkins*, 310 U. S. 381, 84 L. Ed. 1263, 1268.

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities.

Interstate Commerce Commission v. *B. & O. R. R. Co.*, 145 U. S. 265, 36 L. Ed. 699.

One of the leading cases involving the right of the carrier to recover the difference between the freight rate quoted a shipper and the rate established by the Interstate Commerce Commission is *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company* v. *Fink*, 250 U. S. 577, 67 L. Ed. 1151. The pertinent parts of the act construed in the *Fink* case and those in the Bituminous Coal Act are set out below in parallel columns:

Interstate Commerce Act	Bituminous Coal Act
"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any ship-	"No coal subject to the provisions of this section shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the commission, and the sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code; Provided, that the provisions of this paragraph shall not apply to a lawful and bona fide written contract entered into prior to June 16, 1933.

Interstate Commerce Act

per or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

(Act of June 29, 1906, 34 Stat. at L., 587, Chap. 3591, Comp. Stat., Section 8597.)

Bituminous Coal Act

The making of a contract for the sale of coal at a price below the minimum or above the maximum therefor established by the commission at the time of the making of the contract shall constitute a violation of the code, and such contract shall be invalid and unenforceable.

From and after April 26, 1937, until prices shall have been established pursuant to Subsections (a) and (b) of this section, no contract for the sale of coal shall be made providing for delivery for a period longer than thirty days from the date of the contract.

No contract shall be made for the sale of coal for delivery after the expiration date of this subchapter at a price below the minimum or above the maximum therefor established and in effect at the time of making the contract."

(Volume 15, U. S. C. A., page 833.) See also 49 U. S. C. A., Sections 3 and 3(1).

Both the Interstate Commerce Act and the Bituminous Coal Act were passed for the benefit of the public. The object of each was to create uniformity in charges and to create stability where stability had not theretofore existed. If the Interstate Commerce Act gives the carrier the right

to maintain actions to recover what the Interstate Commerce Commission has said are proper charges under the act, then just as surely the Bituminous Coal Act of 1937 gives the right to the seller to recover the prices which the Department of the Interior has established under the Bituminous Coal Act.

The courts have uniformly held that railroad companies can recover the difference between the rate quoted a shipper and the rate established by the Interstate Commerce Commission.

Louisville & Nashville Railroad Company v. *Central Iron & Coal Co.*, 265 U. S. 59, 68 L. Ed. page 900, from the syllabus:

> 1. "A carrier cannot reduce the amount legally payable for transportation of freight in an interstate shipment, or release the liability of the shipper, who has assumed an obligation to pay the charges."
>
> 2. "No act or omission of a carrier, except in permitting the running of the statute of limitations, can estop or preclude it from enforcing payment of the full amount due for transportation of freight by a person liable therefor."

It has been repeatedly held that the carrier is not estopped from maintaining an action against the shipper even where there is collusion between the carrier and the shipper.

Louisville & N. R. Co. v. *Williamson*, 87 Fed. (2d) 34.

A. T. & S. F. Ry. Co. v. *Judson*, 49 Fed. Supp., page 789.

Kurn et al. v. *Pittsburgh Plate Glass Co*, 48 Fed. Supp. 574.

Fort Worth & D. C. Ry. Co. v. *Burkhart Mfg. Co.*, 56 Fed. Supp. 159.

In Pari Delicto Rule Does Not Apply in This Case Because Public Interest Is Involved

Previous to the time the government undertook to regulate the coal industry, it had been almost ruined by keen competition and over-production. Prices had been driven to such a low level that mines could not be operated at a profit, men were out of work and those who worked could not make a living wage. Stabilization was imperative to correct these conditions not only to preserve the coal industry, but also because it was in the public interest that the coal industry be preserved.

The public interest is served in the same degree by suits brought to uphold the coal prices of the Department of the Interior as it is served by suits brought to uphold the tariffs established by the Interstate Commerce Commission. Both classes of actions are brought in the public interest, and because such actions are in the public interest the rule of estoppel does not apply.

The following is taken from the note in 83 A. L. R., page 258:

> "It has been held that a carrier can no more estop itself to collect the full freight rate through a mistake than it could bind itself by contract to collect other than the lawful rate. Bush v. Keystone Driller Co. (1917), 199 Mo. App. 152, 199 S. W. 597.
>
> In Great Northern R. Co. v. Hyder (1922; D. C.), 279 Fed. 783, the court, in answering the contention that the mistake made by a carrier in delivering the shipment to the consignee without requiring payment of the freight charges by the consignor precluded recovery from the consignee, said: 'The railroad, suing in its interest alone, might be estopped; but in suing under the statute, it is suing as a trustee for the protection of the public. The public, in whose interest, as well as its own, the carrier has a lien on the undelivered freight for the full rate, is not estopped,

because it did no act and made no representation on which the consignee relied, and when the consignee accepted the goods, it deprived the public of that lien. It follows that the consignee, because of such act, still remains liable to the carrier, who sues in the public's interest, for the value of the right destroyed.'

With further reference to this point, it was stated in New York, N. H. & H. R. Co. v. York & W. Co. (1913), 215 Mass. 36, 102 N. E., 366 (writ of error dismissed in (1915) 239 U. S. 631, 60 L. Ed. 488, 36 S. Ct. 166): 'Estoppel against the collection of a rate fixed by rigid law cannot be predicated upon a statement or representation which at most can be of no higher binding force than an express contract to the same effect honestly made by both parties would be. Such a contract would be of no avail in any aspect, because contrary to law. Estoppel cannot rest on an illegal contract. * * * The regulation by Congress of interstate commerce rates takes that subject out of the realm of ordinary contract in some respects, and places it upon the rigidity of a quasi statutory enactment. The public policy thus declared supersedes the ordinary doctrine of estoppel so far as that would interfere with the accomplishment of the dominant purpose of the act. It does not permit that the inequality of rates to arise indirectly through the application of estoppel, which it was the aim of the act to suppress directly.' "

In *Louisville & N. R. Co.* v. *McMullen*, 59 So. 683, it is said:

"Of course, the rule that where one, with full knowledge of all the facts, accepts in payment of a debt a less amount than the sum actually due him, he will not be permitted afterwards to claim the balance not paid, is familiar. The rule that money voluntarily paid, with full knowledge of all the facts, cannot be recovered back, is also familiar, as is that other rule that when an illegal contract is executed, and the parties are in pari delicto, the law will not interfere be-

tween them. It is, however, evident that it is the purpose of the federal courts, into whose keeping the Interstate Commerce Law is peculiarly committed, because it is a federal law and covers matters resting peculiarly within the police powers of the federal government, to refuse to permit the oversights, the blunders, or mistakes of the clerks or agents of those engaged in interstate commerce, upon the above ground, to preclude the carrier from collecting, in case of underpayment, the actual amount due on an interstate shipment, or the shipper or consignee, in case of overpayment, from the collection of the amount overpaid."

13 Corpus Juris Secundum, page 873:

"Under the Interstate Commerce Act, a carrier has both a right and an absolute duty to recover the scheduled rates, regardless of its contract."

The Law Wrote the Minimum Price Into the Contract

The contract that existed between October 1, 1940 and March 23, 1941, and which was created by the exchange of letters respectively dated February 27, 1940 and February 29, 1940, embodied the memorandum of agreement entered into March 20, 1933 (R., p. 24) as changed by the letter dated December 2, 1939 (R., p. 30) and subsequent performance thereunder.

It is to be noted that this original agreement provided that "said price * * * shall be subject to any change authorized by the government," and in construing the contract, consideration should be given to the fact that a change was not only authorized by the government, but that a change was required by the government when it established minimum prices.

The 1940 contract was entered into after the enactment of the Bituminous Coal Act, but, regardless of the provision of the 1933 contract quoted above which was carried

into the 1940 contract as noted above, the Petitioner and the Respondent were charged, when they contracted, with the knowledge that the contract was subject to regulation by the government and that any price they might agree on would be subject to change by the government, inasmuch as the government had signified its intention of regulating coal prices when it enacted the Bituminous Coal Act in 1937.

The sale of coal was held to be commerce in the *Sunshine* case, and subject to regulation by Congress. The power of Congress to regulate commerce, as stated in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 Fed. (2d) 943, is paramount to whatever may be agreed between the parties.

Respectfully submitted,

GEORGE A. BLACKFORD,
GORDON D. KINDER,
Counsel for Respondent.